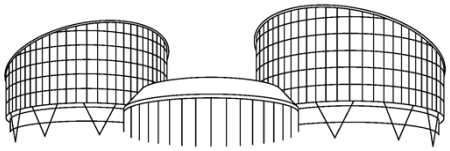

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MARDONSHOYEV v. RUSSIA

(Application no. 8279/16)

JUDGMENT

STRASBOURG

29 January 2019

This judgment is final but it may be subject to editorial revision.

In the case of Mardonshoyev v. Russia,

The European Court of Human Rights (Third Section), sitting as a Committee composed of:

Alena Poláčková, *President,*
Dmitry Dedov,
Jolien Schukking, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 8 January 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 8279/16) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Khurshed Navruzshoyevich Mardonshoyev ("the applicant") on 30 January 2016.

2. The applicant was represented by Mr Yu. Serov, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr M. Galperin, the Representative of the Russian Federation to the European Court of Human Rights.

3. On 12 July 2017 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant was born in Dushanbe, Tajikistan, in 1971 and came to Russia in 1993. He graduated from a vocational training college in the Arkhangelsk Region. He has no identity documents.

6. On 14 August 2014 the Directorate of the Federal Migration Service for the Arkhangelsk Region declared applicant's stay in the Russia undesirable ("the exclusion order"). This order was based on his multiple convictions in the administrative and criminal proceedings. The applicant was required to leave Russia voluntarily by 14 September 2014. He was informed of this decision on 27 August 2014.

7. Since the applicant failed to depart voluntarily, on 2 October 2014 the Plesetskiy District Court in the Arkhangelsk Region found him guilty of failing to leave Russia within the specified time-limit, which was an offence Article 18.8 § 1.1 of the Code of Administrative Offences, imposed a fine on him and ordered his administrative removal from Russia. Pending his removal, the applicant was to be detained in a special facility for the detention of aliens. The removal and detention order indicated that the applicant was an apatride.

8. The applicant was initially placed in one such facility in Arkhangelsk. A few days later the building was damaged by fire. On 7 October the applicant was transferred to the Krasnoye Selo facility in the Leningrad Region (*СУВСИГ УФМС по СПб и ЛО*).

9. Replying to an inquiry from the Federal Migration Service, on 12 November 2014 the Embassy of Tajikistan confirmed that the applicant was not a national of that State. Subsequently, a bailiff asked the District Court in St Petersburg to discontinue the enforcement proceedings because the applicant could not be issued with travel documents or removed from Russia. On 4 December 2014 the Oktyabrskiy District Court refused her application, finding that it had not been shown that the bailiff had taken sufficient measures to secure the applicant's removal.

10. On 8 May 2015 counsel for the applicant asked the Plesetskiy District Court to discontinue the enforcement of the removal and detention order. He submitted that the applicant was an apatride, that no State was willing to accept him, and that he had already spent seven months in custody in poor conditions.

11. On 4 June 2015 the District Court rejected the application. It considered that even an apatride could be removed from Russia and that the length of the applicant's detention had not been unreasonable.

12. On appeal from counsel, the Arkhangelsk Regional Court set aside the District Court's decision. Referring to the case-law of the Russian Constitutional Court prohibiting indefinite detention of individuals (judgment no. 6-P of 17 February 1998), it held that the removal and detention order should have set the maximum period of the applicant's detention.

13. On 31 July 2015 the District Court carried out a fresh determination of the application. It found that enforcement was no longer feasible because the applicant was not a national of Tajikistan and that he had already spent a long time in the detention centre. The District Court discontinued the execution of the removal and detention order and ordered the applicant's release. He was released on the same day.

14. In so far as the parties' descriptions of the conditions of the applicant's detention coincided or were undisputed, they may be summarised as follows. The applicant shared the cell with three other detainees. Its floor surface was given as fifteen square metres by the

applicant and as twenty-seven square metres by the Government. Each detainee had his own bed and bed linen. A squat toilet and a sink were placed inside the cell and separated with a one-metre-high wall. Detainees were allowed to spend up to fifteen minutes outside per week, in the courtyard of the facility. Food was brought in pre-cooked, the ration did not include fish, dairy products or fresh fruit.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. For relevant provisions of the domestic law and practice, see *Kim v. Russia*, no. 44260/13, §§ 23-25, 17 July 2014.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

16. The applicant complained that the conditions of his detention in the Krasnoye Selo facility had been in breach of Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment ..."

17. The Government submitted documents and photographs, as well as a detailed description of the applicant's conditions of detention. They considered that Article 3 had not been violated in the present case.

18. The Court has found that the conditions of detention in the Krasnoye Selo facility, as they obtained at least until late 2014, amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention (see *Kim v. Russia*, no. 44260/13, § 34, 17 July 2014, and *M.S.A. and Others v. Russia*, no. 29957/14 and 8 others, § 58, 12 December 2017). As regards the subsequent period, the Court has been unable to find indications of a severe overcrowding or any other factors entailing a violation of Article 3 (see *Mskhiladze v. Russia*, no. 47741/16, §§ 38-39, 13 February 2018, and *Mainov v. Russia*, no. 11556/17, § 19, 15 May 2018).

19. In the present case, the cell in which the applicant was held measured at least fifteen square metres according to him or was almost twice as large according to the Government. The cell housed four people. It cannot therefore be established that it was affected by severe overcrowding of the kind capable of creating a strong presumption of a violation of Article 3 (see *Muršić v. Croatia* [GC], no. 7334/13, §§ 136-37, ECHR 2016, and *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 165-67 and 170,

ECHR 2016 (extracts)). Even though a one-metre-high partition between the squat toilet and the rest of the cell was insufficient to ensure a minimum level of privacy when using the toilet, this element, on its own, did not reach the threshold of severity required to characterise the treatment as inhuman or degrading within the meaning of Article 3 (see *Szafrański v. Poland*, no. 17249/12, §§ 25-29, 15 December 2015). Nor can it be found that the cumulative effect of the other aspects of the detention which the applicant complained about, including a limited food ration or short periods of outdoor exercise, went beyond that threshold (compare *Mskhiladze* and *Mainov*, both cited above).

20. It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

21. The applicant complained under Article 5 § 1 (f) of the Convention that the Russian authorities had not pursued the removal proceedings in good faith because they had been fully aware that his removal had not been a realistic possibility. He also complained that he had not been able to initiate a judicial review of his detention, in breach of Article 5 § 4 of the Convention. The relevant parts of Article 5 read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation or extradition.
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

22. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

23. The Court will consider firstly whether there was effective judicial supervision over the lawfulness of the applicant's detention, as required by

Article 5 § 4 of the Convention, and secondly whether it was compatible with the requirements of Article 5 § 1 (f) of the Convention (see *Kim*, cited above, § 38).

1. Compliance with Article 5 § 4 of the Convention

24. The Government submitted that the maximum duration of detention in cases such as the present one was limited to two years. If any new circumstances emerged which rendered his detention unnecessary or removal impossible, the applicant could have lodged an application for supervisory review of the initial removal and detention order.

25. The Court reiterates that the purpose of Article 5 § 4 of the Convention is to guarantee to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected. A remedy must be made available during a person's detention and should be capable of leading, where appropriate, to release (see *Kim*, cited above, § 41, with further references).

26. The Court has found a violation of Article 5 § 4 of the Convention in many cases against Russia on account of the absence of any domestic legal provision which could have allowed the applicant to bring proceedings for judicial review of his detention pending expulsion and to secure, if necessary, his release (see *Kim*, cited above, §§ 39-43; *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, §§ 140-42, 15 October 2015; *Rakhimov v. Russia*, no. 50552/13, §§ 148-50, 10 July 2014; *Akram Karimov v. Russia*, no. 62892/12, §§ 199-204, 28 May 2014; *Egamberdiyev v. Russia*, no. 34742/13, § 64, 26 June 2014; and *Azimov v. Russia*, no. 67474/11, § 153, 18 April 2013).

27. The situation of the present case was, however, different from that obtaining in the above-mentioned cases. Counsel for the applicant introduced an application to have the detention and removal proceedings discontinued on the ground that removal was no longer a realistic prospect (see paragraph 10 above). His application was initially unsuccessful (see paragraph 11 above). However, it was held on appeal that a detention which is unlimited in time could not be lawful and directed the first-instance court to assess the matter of an allegedly excessive duration of the applicant's detention (see paragraph 12 above). A new assessment of the application convinced the first-instance court that the applicant's removal was not feasible and that he had spent in detention longer that it was reasonable in the circumstances of the case (see paragraph 13 above). The applicant was released on the same day.

28. It is true that those proceedings took almost three months, but the applicant did not complain about a violation of the "speediness" aspect of Article 5 § 4. As it happened, those proceedings led to an assessment of the lawfulness of his detention and to his release. Accordingly, there has been

no violation of Article 5 § 4 in the particular circumstances of the present case.

2. Compliance with Article 5 § 1 (f) of the Convention

29. The Government pointed out that the applicant had not attempted to regularise his stay in Russia and had therefore borne full responsibility for the domestic court's decision to issue a removal and detention order. The duration of the proceedings had been accounted for by the time it had taken the domestic authorities to obtain information about his nationality from the Embassy of Tajikistan and to consider the bailiff's request for a discontinuation of the enforcement proceedings. The Government concluded that there was no breach of Article 5 § 1 (f).

30. The Court reiterates, to avoid being branded as arbitrary, detention under Article 5 § 1 (f) of the Convention must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued. The domestic authorities have an obligation to consider whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified (see *Kim*, cited above, §§ 49 and 53, with further references).

31. In the present case, starting from 12 November 2014 the domestic authorities were aware that the applicant was not a national of Tajikistan and that his removal to that State was not feasible (see paragraph 9 above). The Court reiterates that detention cannot be said to have been effected with a view to the applicant's removal if it was not a realistic prospect because he was not a national of the State to which the authorities sought to remove him (compare *Kim*, cited above, §§ 52-53, and the case-law cited therein). It does not appear that there was any progress in the enforcement proceedings after 12 November 2014 and until the applicant's release more than seven months later. The Government did not provide evidence of any efforts having been made to secure the applicant's admission to a third country. The authorities had not asked him to specify such a country or taken any steps to explore that option on their own initiative (contrast *Chkhikvishvili v. Russia*, no. 43348/13, § 30, 25 October 2016). The time it took the authorities to complete the internal procedures cannot justify a lack of genuine progress in the removal proceedings which caused his detention to cease to be lawful.

32. There has accordingly been a violation of Article 5 § 1 (f) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

34. The Government submitted that Article 41 was to be applied in accordance with the established case-law.

A. Damage

35. The applicant asked the Court to determine the amount of compensation in respect of non-pecuniary damage. He also asked the Court to hold that the sums payable to him be transferred to the bank account of his representative Mr Serov, as he did not have any identity document and could not open an account in his own name.

36. The Court awards the applicant 7,500 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable. It also grants the applicant's request to have the award paid into the account of Mr Serov.

B. Costs and expenses

37. Mr Serov also claimed on behalf of the applicant EUR 1,600 in legal fees for the proceedings before the Court. He asked to have the award transferred to the bank account of the Anti-Discrimination Centre Memorial (ADC Memorial), a non-governmental organisation in Brussels, Belgium.

38. Regard being had to the documents in its possession and its practice in similar cases (see *Mskhiladze*, cited above, § 64), the Court considers it reasonable to award the sum of EUR 1,000 covering costs under all heads, plus any tax that may be chargeable to the applicant, in respect of costs and expenses, payable into the account of the Anti-Discrimination Centre Memorial (ADC Memorial) in Belgium.

C. Default interest

39. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints relating to the applicant's detention pending removal admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 5 § 4 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months the following amounts:

(i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, payable into the bank account of Mr Yu. Serov;

(ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, payable into the bank account of Anti-Discrimination Centre Memorial;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Alena Poláčková
President